Supreme Court, U.S.
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99-198

No.

In the

Supreme Court of the United States

KATHLEEN EVANS, as Conservator of
JESSICA EVANS, a protected person,

Petitioner,

v.

LEDERLE LABORATORIES, LINK CLINIC
and O. SHARMA,

Respondents.

RESPONDENT LINK CLINIC AND O. SHARMA'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The Petitioner had numerous alternative remedies available for the pursuit of her claims. Prior to seeking recovery under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1, *et seq.* the Petitioner voluntarily dismissed an action in the Fifth Judicial Circuit of the State of Illinois and likewise dismissed an action in the United States Central District of Illinois. Pursuant to 735 ILCS 5/13-217 the Petitioner was prevented by Illinois law from filing a third lawsuit. The Petitioner failed to recover under the National Childhood Vaccine Injury Act and then filed a third lawsuit in the United States District Court for the Central District of Illinois. The District Court appropriately dismissed the action. The Illinois Supreme Court has consistently held that a Petitioner is entitled to only one refiling of a lawsuit. The District Court appropriately dismissed the Petitioner's complaint when she attempted a second refiling.

The Petitioner further claims that the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1, *et seq.* preempts the application of 735 ILCS 5/13-217. The Petitioner elected to pursue a remedy under the National Childhood Vaccine Injury Act, but she was neither compelled to do so nor did Federal preemption require her to do so. The Petitioner, by voluntarily dismissing her lawsuit for the second time, abandoned any effort to recover any civil action against Respondent's Link Clinic and O. Sharma. The decision of the District Court applying 735 ILCS 5/13-217 in dismissing the Petitioner's complaint was appropriate as was the decision of the United States Court of Appeals for the Seventh Circuit.

THE PETITION SHOULD BE DENIED BECAUSE ILLINOIS LAW LIMITS A PARTY TO ONE REFILING OF A LAWSUIT

Under Illinois law 735 ILCS 5/13-217 a party may dismiss a lawsuit and then begin a new action within one year or within the remaining period of limitation. The Petitioner dismissed the action pending in the court system of the State of Illinois, refiled in the United States District Court for the Central District of Illinois and then dismissed that action electing to proceed under the National Childhood Vaccine Injury Act. There can be no persuasive argument that 735 ILCS 5/13-217 is inapplicable to the facts of this case. A federal court sitting in diversity must apply the substantive law of the forum state. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 SCt. 817 (1938). Statutes of limitations have long been recognized as part of a State's substantive law where their provisions may be outcome determinative or are to be considered as part of a State's "rules of decision." *Guaranty Trust of New York v. York*, 326 U.S. 99, 111, 65 SCt. 1464, 1470 (1945). The District Court as well as the United States Court of Appeals for the Seventh Circuit appropriately relied upon *Koffski v. Village of North Barrington*, 988 F.2d 41 (7th Cir. 1993) which holds that § 13-217 applies and that a plaintiff is entitled to a single refiling.

The Illinois Supreme Court has consistently held that § 13-217 provides for a single refiling. *Flesner v. Young's Developments Co.*, 145 Ill.2d 252, 582 N.E. 2d 720, (Ill., 1991); *Gendek v. Jehangir*, 119 Ill.2d 338, 518 N.E. 2d 105, (Ill., 1988); *Timberlake v. Illinois Hospital*, 175 Ill.2d 159, 676 N.E. 2d 634 (Ill., 1997). The Petitioner suggests that the statute of limitations has not run regarding the disabled

minor's claim, but such an assertion was addressed by the Illinois Supreme Court in *Flesner v. Young's Development Co.,* 145 Ill.2d 252, 582 N.E. 2d 720 (Ill., 1991) wherein the Court stated that Section 13-217 "expressly permits one, and only one, refiling of a claim even if the statute of limitations has not expired." *Flesner v. Young's Development Co.,* 145 Ill.2d at 254, 582 N.E. 2d at 721 (Ill., 1991).

THE PETITION SHOULD BE DENIED BECAUSE CONGRESS DID NOT INTEND FOR THE CHILDHOOD VACCINE INJURY ACT TO PREEMPT THE APPLICATION OF A STATE'S STATUTE OF LIMITATIONS

The Petitioner suggests that 42 U.S.C. § 300 aa-11(a)(5)(A) permits her to dismiss a viable pending action and proceed without consequence. The Petitioner further suggests that one should ignore Congressional intent.

The United States Court of Appeals for the Seventh Circuit specifically addressed the Congressional intent question and determined that the legislative history specifically addressed the statute of limitations question. The Court determined that the legislative history spoke directly to the issue of the statute of limitation and that the Petitioner offered no alternative history to support her interpretation of the Act. It must be underscored that § 300 aa-11(a)(5)(A) was discretionary in that one who had a pending action "may" proceed under the National Childhood Vaccine Injury Act.

THE PETITION SHOULD BE DENIED BECAUSE TO DO OTHERWISE WOULD RATIFY THE PETITIONER'S FLAWED LEGAL STRATEGY

All actions must have finality. The Petitioner suggests there is no limitation or termination of her remedies. The Petitioner had a viable cause of action that was pending in the Circuit Court for the Fifth Judicial Circuit, Coles County in the State of Illinois. She elected to dismiss that cause of action. The Petitioner then elected to file her action in the United States District Court for the Central District of Illinois. She had a viable action pending in that forum until she again unilaterally elected to dismiss the cause of action to seek recovery in the Court of Claims. In dismissing the action in the Central District of Illinois the Petitioner knew that she had exhausted her one refiling under Illinois law. There have been choices available to the Petitioner since the birth of Jessica Evans in 1978 but any action against the Respondents was exhausted when the action was dismissed in the Central District of Illinois on August 28, 1990.

CONCLUSION

The Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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